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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
9

10 In re MORNING SONG BIRD FOOD  
11 LITIGATION

) Lead Case No.

3:12-cv-01592-JAH-AGS

12 This Document Relates To:

) CLASS ACTION

13 ALL ACTIONS.

) ORDER GRANTING MOTION FOR  
PRELIMINARILY APPROVAL OF  
CLASS ACTION SETTLEMENT  
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16 WHEREAS, the consolidated action captioned *In re Morning Song Bird Food*  
17 *Litigation*, Lead Case No. 3:12-cv-01592-JAH-AGS, and all of the actions  
18 consolidated in and related to it (the “Action”) is pending before the Court; and

19 WHEREAS, the parties to the Action have applied pursuant to Rule 23 of the  
20 Federal Rules of Civil Procedure for preliminary approval of the proposed settlement  
21 (the “Settlement”) in accordance with the Stipulation of Class Action Settlement  
22 entered into by the Parties on December 7, 2018 (the “Agreement”), a copy of which  
23 was filed with the Court on December 7, 2018, and have consented to the entry of  
24 this Preliminary Approval Order; and

25 WHEREAS, the parties to the Action filed a joint motion for substitution of  
26 revised notices for preliminary approval of the Settlement on January 9, 2019,  
27 attaching as Exhibits 1 and 2 proposed revised versions of the Long-Form Notice  
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1 and Publication Notice to be substituted for the Notices previously submitted with  
2 the preliminary approval motion as Exhibits D and G to the Stipulation, respectively;  
3 and

4 WHEREAS, the Court having reviewed the Agreement, its Exhibits, and other  
5 submissions of the parties, having considered all of the files, records, and pleadings  
6 in this Action, and being otherwise fully advised, and good cause appearing therefor.

7 NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

8 1. The capitalized terms used in this Order shall have the same meanings  
9 as defined in the Agreement unless otherwise specified or defined in this Order.

10 2. The parties' joint motion for substitution of revised notices is  
11 GRANTED.

12 3. For purposes of the Settlement only, the Court certifies the Settlement  
13 Class, which consists of all Persons who, between November 1, 2005 and May 1,  
14 2008, purchased and have not yet received a full refund for their Morning Song Bird  
15 Food purchases. "Morning Song Bird Food" means any Scotts wild bird food  
16 product containing Storcide II, Actellic 5E, or their active ingredients, chlorpyrifos-  
17 methyl or pirimiphos-methyl, respectively, as set forth in the list of products attached  
18 as Exhibit E to the Agreement. The following entities and individuals are excluded  
19 from the Settlement Class: (a) Defendants and their immediate families, the officers,  
20 directors and affiliates of Defendants, at all relevant times, members of their  
21 immediate families and their legal representatives, heirs, successors or assigns, and  
22 any entity in which Defendants have or had a controlling interest; (b) distributors,  
23 retailers, and other resellers of Morning Song Bird Food; (c) judicial officers and  
24 their immediate family members and associated court staff assigned to this case; and  
25 (d) all those otherwise in the Settlement Class who timely and properly exclude  
26 themselves from the Settlement Class as provided in the Agreement and this  
27 Preliminary Approval Order.

1           4.     The Court preliminarily concludes, based on its prior order granting  
2 certification of a litigation class and the information submitted to date, that the  
3 requirements of Federal Rule of Civil Procedure 23 have been satisfied.  
4 Specifically, the Court finds that: (a) the Settlement Class is so numerous that joinder  
5 of all members is impracticable; (b) there are questions of law and fact common to  
6 the Settlement Class, and such questions predominate over any questions affecting  
7 only individual members; (c) the claims of Plaintiffs as representative plaintiffs are  
8 typical of the claims of the Settlement Class; (d) Plaintiffs and Class Counsel have  
9 fairly and adequately protected and represented the interests of the Settlement Class;  
10 and (e) a settlement class is superior to other available methods for fairly and  
11 efficiently adjudicating the claims and disputes at issue in this Action. Defendants  
12 retain all rights to challenge whether the Action may proceed as a class action, except  
13 for settlement purposes only.

14           5.     The Court hereby appoints Plaintiffs Laura Cyphert, Milt Cyphert,  
15 Ellen Larson, and David Kirby as the Settlement Class representatives and Robbins  
16 Geller Rudman & Dowd LLP, Dowd & Dowd P.C., and The Driscoll Firm, P.C. as  
17 Class Counsel.

18           6.     The Court preliminarily approves the Settlement set forth in the  
19 Agreement as fair, reasonable, adequate, and in the best interests of the Settlement  
20 Class.

21           7.     A hearing (the “Fairness Hearing”) shall be held on **June 3, 2019 at**  
22 **2:30 p.m.** in Courtroom 13B of the United States District Court for the Southern  
23 District of California, at the James M. Carter and Judith N. Keep United States  
24 Courthouse, 333 West Broadway, San Diego, California 92101, to determine:  
25 (a) whether the Settlement Class should be finally certified; (b) whether the  
26 Settlement set forth in the Agreement should be finally approved as fair, reasonable,  
27 adequate, and in the best interests of the Settlement Class; (c) whether a final  
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1 judgment should be entered dismissing the claims of the Plaintiffs and the Settlement  
2 Class Members with prejudice, as required by the Agreement and releasing claims  
3 as required by the Agreement; (d) whether and, if so, in what amount to award  
4 Attorneys' Fees and Expenses to Class Counsel pursuant to the fee application to be  
5 filed as referenced in this Order (if any); (e) whether and, if so, in what amount to  
6 award Service Awards to Plaintiffs in recognition of their time and service to the  
7 Settlement Class pursuant to the application to be filed as referenced in this Order  
8 (if any); and (f) any objections to the Settlement, the application for Attorneys' Fees  
9 and Expenses, and/or the application for Service Awards.

10       8. All papers in support of final approval of the Settlement shall be filed  
11 with the Court and served upon all counsel of record by **April 29, 2019**. Class  
12 Counsel shall file with the Court and serve upon all counsel of record any  
13 application, and all papers in support of any such application, for an award of  
14 Attorneys' Fees and Expenses and/or for Service Awards for Plaintiffs by **April 29,**  
15 **2019**. Any reply papers shall be filed with the Court and served upon all counsel of  
16 record by **May 24, 2019**.

17       9. Having reviewed the form and content of the proposed forms of the  
18 Long-Form Notice and the Publication Notice submitted by the Parties as Exhibits  
19 1 and 2 to their January 9, 2019 joint motion, as well as the Retailer-Identified  
20 Refund Notice submitted by the Parties as Exhibit H to the Agreement, the Court  
21 hereby approves such Notices. The Parties shall have discretion to jointly make  
22 minor non-material revisions to the Notices before emailing, mailing, and/or  
23 publishing them.

24       10. The Court finds and determines that dissemination and publication of  
25 the Notices as set forth in the Notice Plan in the Agreement constitutes the best notice  
26 practicable under the circumstances, constitutes due and sufficient notice of the  
27 Settlement and the matters set forth in the Notices to all persons entitled to receive  
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1 notice, and fully satisfies the requirements of due process and of Federal Rule of  
2 Civil Procedure 23.

3        11. KCC LLC is hereby appointed as the Settlement Administrator, to  
4 implement and administer the Notice Plan and the Settlement, including the claims  
5 process and Refunds as described in the Agreement, subject to the oversight of the  
6 Parties and this Court.

7        12. The Court directs the Settlement Administrator to review the Retailer  
8 Records and information provided by Class Counsel and Defendants' Counsel to  
9 identify recipients of the Retailer-Identified Refund Notice and the Long-Form  
10 Notice per the terms of the Parties' Agreement. The Settlement Administrator shall  
11 keep and maintain Settlement Class Member contact information as confidential and  
12 shall use such information only for purposes of the Settlement.

13        13. The Court directs the Settlement Administrator to commence  
14 dissemination of the Retailer-Identified Refund Notices and Long-Form Notices, as  
15 set forth in the Agreement, within thirty (30) days after entry of this Order and to  
16 commence publication of the Publication Notice, as set forth in the Agreement,  
17 within thirty (30) days after entry of this Order or as soon as reasonably practicable  
18 thereafter. In addition, the Court directs the Settlement Administrator: (a) to  
19 establish a settlement website and post to it the Long-Form Notice and Claim Form  
20 as well as other important documents and deadlines in consultation with Class  
21 Counsel and Defendants' Counsel; (b) to establish a post-office box for the receipt  
22 of any Settlement-related correspondence; (c) to establish a toll-free telephone  
23 number that will provide automated Settlement-related information to Settlement  
24 Class Members; (d) to respond to inquiries or requests from Settlement Class  
25 Members in consultation with Class Counsel and Defendants' Counsel; and (e) to  
26 respond to inquiries or requests from Class Counsel, Defendants' Counsel, and the  
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1 Court. The Settlement Administrator and the Parties shall promptly send copies of  
2 any requests for exclusion, objections, and related correspondence to each other.

3 14. By **May 24, 2019**, the Settlement Administrator shall file with the Court  
4 the details outlining the scope, method, and results of the Notice Plan.

5 15. Not later than ten (10) days after the filing of the Agreement with the  
6 Court, Defendants shall serve, or cause to be served, notice of the proposed  
7 Settlement upon the appropriate federal and state officials in compliance with the  
8 requirements of the Class Action Fairness Act, 28 U.S.C. §1715 *et seq.* (“CAFA”).  
9 By **May 24, 2019**, Defendants’ Counsel shall serve, or cause to be served, on Class  
10 Counsel and filed with the Court proof, by affidavit or declaration, regarding  
11 compliance with CAFA §1715(b).

12 16. The Court approves the Claim Form submitted by the Parties as  
13 Exhibit A to the Agreement. The Parties shall have discretion to jointly make minor  
14 non-material revisions to the Claim Form distributing it to the Settlement Class.

15 17. Any Settlement Class Member who wishes to request a Proof of  
16 Purchase Refund and/or a Claim Form Refund shall submit a Claim Form with all  
17 supporting documentation (including Proof of Purchase and Claim Form Affidavit,  
18 respectively) to the Settlement Administrator by regular, first-class mail or via the  
19 settlement website by **July 1, 2019**.

20 18. Any and all Retailer-Identified Refunds, Proof of Purchase Refunds,  
21 Claim Form Refunds, Supplemental Claim Form Refunds, and Second  
22 Supplemental Claim Form Refunds shall be issued to Settlement Class Members in  
23 accordance with the procedures set forth in the Agreement.

24 19. Any Settlement Class Member who intends to object to the fairness of  
25 the Settlement, Class Counsel’s request for Attorneys’ Fees and Expenses, Plaintiffs’  
26 request for Service Awards, or any other aspect of the Settlement must serve and file  
27 a written objection explaining why he or she believes the Settlement should not be  
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1 approved by the Court as fair, reasonable, and adequate. The written statement of  
2 the objection must include a detailed statement of the Settlement Class Member's  
3 objection(s), as well as the specific reasons, if any, for each such objection, including  
4 any evidence and legal authority the Settlement Class Member wishes to bring to the  
5 Court's attention. That written statement also must contain the Settlement Class  
6 Member's printed name, address, telephone number, and Morning Song Bird Food  
7 product purchases forming the basis of the Settlement Class Member's inclusion in  
8 the Settlement Class, and any other supporting papers, materials, or briefs the  
9 Settlement Class Member wishes the Court to consider when reviewing the  
10 objection. The objection must state whether it applies only to the objector, to a  
11 specific subset of the Settlement Class, or to the entire Settlement Class, and must  
12 state with specificity the grounds for the objection. A Settlement Class Member  
13 seeking to make an appearance at the Fairness Hearing must file with the Court, by  
14 **May 13, 2019**, written notice of his or her intent to appear at the Fairness Hearing.  
15 Lawyers asserting objections on behalf of Settlement Class Members also must file  
16 a notice of appearance with the Court by **May 13, 2019**. Any Person filing an  
17 objection shall, by doing so, submit himself or herself to the exclusive jurisdiction  
18 and venue of the Court, and shall agree to be subject to discovery by the Parties with  
19 respect to both the objection and any objections to other class action settlements  
20 lodged by the objector.

21       20. Any notice of intention to appear and objection must be addressed to  
22 the Clerk of Court; must refer to the action *In re Morning Song Bird Food Litigation*,  
23 Lead Case No. 3:12-cv-01592-JAH-AGS, and must be filed with, and received by,  
24 the Clerk of Court by **May 13, 2019**, by hand delivery or first class mail, postage  
25 prepaid, at:

26           Clerk of Court  
27           U.S. District Court for the  
28           Southern District of California  
             James M. Carter and Judith N. Keep  
             United States Courthouse

1 333 West Broadway  
San Diego, California 92101

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3 Copies of any such submission and all included materials also must be served upon  
4 the following counsel by hand delivery or first class mail, postage prepaid, on or  
before that same date:

5 Rachel L. Jensen  
6 ROBBINS GELLER RUDMAN  
& DOWD LLP  
7 655 West Broadway, Suite 1900  
San Diego, CA 92101

Edward Patrick Swan, Jr.  
JONES DAY  
4655 Executive Drive, Suite 1500  
San Diego, CA 92121-3134

8 *Class Counsel*

*Counsel for Defendants The Scotts  
Miracle-Gro Company and The  
Scotts Company LLC*

9  
10 Mark Holscher  
KIRKLAND & ELLIS LLP 333  
11 South Hope Street  
Los Angeles, CA 90071

12 *Counsel for Defendant James  
13 Hagedorn*

14 21. No Person shall be entitled to object to the Settlement, to the final  
15 judgment to be entered in this Action, to any award of Attorneys' Fees and Expenses  
16 to Class Counsel, or to any Service Award to Plaintiffs, or otherwise to be heard,  
17 except by serving and filing a written notice of intention to appear and written  
18 objections in the form and manner, and by the date, required by the Notice and the  
19 terms of this Order. Any Settlement Class Member who fails to object in the manner  
20 and by the date required shall be deemed to have waived and forfeited any and all  
21 rights he or she may have to object to the Settlement and/or to appear and be heard  
22 on his or her objection at the Fairness Hearing (including any right to appeal), shall  
23 be forever barred from raising such objections in this Action or any other action or  
24 proceeding, and shall be bound by all the terms of the Agreement and by all  
25 proceedings, orders and judgments, including, but not limited to, the release of the  
26 Plaintiffs' Released Claims.



1           22. Any Settlement Class Member who wishes to exclude himself or  
2 herself from the Settlement must personally sign and submit a written request to opt  
3 out stating “I wish to exclude myself from the Settlement Class in *In re Morning*  
4 *Song Bird Food Litigation*” (or substantially similar clear and unambiguous  
5 language) to the Settlement Administrator on or before **May 13, 2019**. The written  
6 request must also include: the Settlement Class Member’s printed name, address,  
7 and telephone number; a statement that the individual requesting exclusion is a  
8 Settlement Class Member; and the Morning Song Bird Food purchased with  
9 approximate dates, retailers, product type, and purchase.

10           23. No one shall be permitted to exercise any exclusion rights on behalf of  
11 any other person, whether as an agent or representative of another or otherwise,  
12 except upon proof of a legal power of attorney, conservatorship, trusteeship, or other  
13 legal authorization and no one may exclude other persons within the Settlement  
14 Class as a group, class, or in the aggregate.

15           24. If a Settlement Class Member timely and validly has excluded himself  
16 or herself from the Settlement Class, such Settlement Class Member shall not be  
17 legally bound by the terms of the Settlement, shall not receive any benefits of the  
18 Settlement, including any Refunds, and shall not be able to object to any aspect of  
19 the Settlement.

20           25. Not later than seven (7) days before the date of the Fairness Hearing,  
21 the Settlement Administrator shall file with the Court a list of those Persons who  
22 have timely and validly excluded themselves from the Settlement. The Court retains  
23 jurisdiction to resolve any disputed exclusion requests.

24           26. The Court may, for good cause, extend any of the deadlines set forth in  
25 this Order without further notice to the Settlement Class Members. The Court may,  
26 from time to time, reschedule or postpone the Fairness Hearing without further  
27 notice to the Settlement Class.

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1           27. All proceedings in this Action, other than proceedings as may be  
2 necessary to carry out the terms and conditions of the Settlement, are hereby stayed  
3 and suspended until further order of the Court. From the date of entry of this Order  
4 until this Court determines whether the Final Order and Judgment should be entered,  
5 Plaintiffs and all Settlement Class Members, and any of them, are barred and  
6 enjoined from initiating, asserting and/or prosecuting, in any capacity, any of  
7 Plaintiffs' Released Claims, including any Unknown Claim, against any Released  
8 Defendant in any court or any forum.

9           28. If the Court does not approve the Settlement, or the Settlement does not  
10 become effective for any reason whatsoever: (a) the Settlement (including any  
11 modification of it made with the consent of the Parties as provided for in the  
12 Agreement), any class certification in this Order, and any actions taken or to be taken  
13 in connection therewith (including this Order and any judgment entered regarding  
14 the Settlement) shall be terminated and shall become null and void and shall have  
15 no further force and effect and no Party shall be bound thereby; (b) all of the  
16 provisions of the Agreement, and all negotiations, statements, and proceedings  
17 relating to it, shall be without prejudice to the rights of Defendants, Plaintiffs, or any  
18 Settlement Class Member, all of whom shall be restored to their respective positions  
19 existing immediately before the execution of the Agreement, except that the Parties  
20 shall cooperate in requesting a new scheduling order such that no Party's substantive  
21 or procedural rights are prejudiced by the settlement negotiations and proceedings;  
22 (c) neither the Agreement, the fact of its having been entered into, nor the  
23 negotiations leading to it shall be offered into evidence for any purpose whatsoever;  
24 (d) Scotts shall bear all reasonable and necessary costs incurred by the Settlement  
25 Administrator in connection with the implementation of this Settlement up until its  
26 termination, including the Initial Costs Cap and any other Notice and Administration  
27 Expenses agreed to by the Parties or ordered by the Court; and (e) within five (5)  
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1 business days, any funds in the Settlement Fund Account, including any interest  
2 accrued, shall be returned to Scotts, minus incurred Notice and Administration  
3 Expenses and Taxes and Tax Expenses. If a Settlement Class Member has (a) timely  
4 submitted a valid Claim Form, and (b) received any Refund or any compensation  
5 pursuant to the Agreement prior to its termination or invalidation, such a Settlement  
6 Class Member and Defendants shall be bound by the terms of their respective  
7 Releases set forth in the Agreement, which terms shall survive termination or  
8 invalidation of the Agreement or the Settlement.

9         29. Neither the Agreement, nor any act performed or document executed  
10 pursuant to or in furtherance of the Agreement is or may be deemed to be or may be  
11 used as an admission of, or evidence of, the validity of any of the Released Claims,  
12 or of any wrongdoing or liability of any Released Defendant or Released Plaintiff or  
13 Settlement Class Member; or is or may be deemed to be or may be used as an  
14 admission of, or evidence of, any fault or omission of any Released Defendant or  
15 Released Plaintiff or Settlement Class Member in any civil, criminal, regulatory, or  
16 administrative proceeding in any court, administrative agency or other tribunal. Nor  
17 shall the Agreement be deemed an admission by any Party as to the merits of any  
18 claim or defense.

19         30. The Court shall retain exclusive and continuing jurisdiction over all  
20 Parties, the Action, and the Agreement to resolve any dispute that may arise  
21 regarding the Agreement, the Settlement, or in relation to the Action, including any  
22 dispute regarding validity, performance, interpretation, administration, enforcement,  
23 enforceability, or termination of the Agreement and the Settlement. The Court  
24 retains ongoing and exclusive jurisdiction and independent case management  
25 authority regarding the general administration of the Settlement and the Settlement  
26 Administrator.

1           31. The Court may approve amendments, modification, or expansion of the  
2 terms and provisions of the Agreement as may be agreed to by the Parties in writing  
3 without further notice to the Settlement Class.

4           32. The hearing set for February 4, 2019 is VACATED.

5           IT IS SO ORDERED.

6           DATED: January 31, 2019

  
\_\_\_\_\_  
THE HONORABLE JOHN A HOUSTON  
UNITED STATES DISTRICT JUDGE